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IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

NO. 85-356

JAMES T. OMAN, FRED R. WALKER,
WILLIE A. GIBBONS, and HUGH V. REYNOLDS,
Petitioners,

v.

H. K. PORTER, CO.,
RAYMARK INDUSTRIES, INC., and
PITTSBURGH CORNING CORP.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF BLATT & FALES AS AMICUS CURIAE

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 36.1 of the Rules of this Court, Blatt & Fales respectfully moves this Court for leave to file a brief amicus curiae in the above-captioned matter. Although petitioners have granted their consent to this brief, counsel for respondents have not replied to movant's letter requesting their consent.

Interest of Amicus Curiae

Blatt & Fales is a law firm with offices in Barnwell, South Carolina and Charleston, South Carolina, which is actively involved in the representation of plaintiffs in asbestos litigation. Blatt & Fales presently serves as plaintiff's counsel or co-counsel in approximately 4000 asbestos cases pending in federal and state courts in various jurisdictions, including Alabama, Connecticut, Florida, Georgia, Louisiana, Maine, Massachusetts, Mississippi, New Jersey, New Hampshire, North Carolina, Rhode Island, South Carolina, Texas, Virginia, Washington, and Wisconsin. Blatt & Fales also presently serves as plaintiff's counsel or co-counsel in numerous cases in these jurisdictions in which litigation has not yet been instituted. A substantial portion of the cases in both of these categories involve shipyard workers under circumstances that may implicate the admiralty jurisdiction of the federal courts.

The questions presented in the instant case are matters of continuing importance to Blatt & Fales and other members of the plaintiff's bar in asbestos litigation. Stated briefly, the essential questions concern the scope of federal admiralty jurisdiction and the application of admiralty jurisdiction and maritime law to the asbestos-related claims of shipyard workers. Movant submits that the decision below in this case erroneously and improperly restricts the legitimate exercise of federal admiralty jurisdiction as historically applied by the federal judiciary in general and by this Court in particular. Moreover, the unwarranted erosion of federal admiralty jurisdiction occasioned by the decision below will undermine the benevolent foundation of traditional maritime jurisprudence, subjecting plaintiffs to the vagaries of conflicting state laws and raising the specter of rampant forum shopping.

While movant would readily concede that the interests of petitioners herein will be ably represented by their counsel, the national importance of these issues suggests that this Court may benefit from the perspective of amici curiae involved in asbestos-related litigation in other jurisdictions. The interest of Blatt & Fales is thus predicated on the substantial and far-reaching effects that any decision here may have for shipyard workers across the country who are subject to the deleterious and often fatal consequences of asbestos exposure. Movant is also

concerned that this Court be fully apprised of the manifold ramifications attendant to the withdrawal of admiralty jurisdiction and maritime law from the thousands and possible tens of thousands of shipyard workers who are suffering from the latent and insidious effects of asbestos-related diseases. For these reasons, Blatt & Fales requests this opportunity to present its views on the instant case to this Court.

Conclusion

For the foregoing reasons, we respectfully urge the Court to grant this motion for leave to file the accompanying brief amicus curiae in the present case in support of the position of the petitioners.

Respectfully submitted,

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BRIEF OF BLATT & FALES AS AMICUS CURIAE

Interest of Amicus Curiae

The interest of Blatt & Fales as amicus curiae has previously been set forth in the Motion for Leave to File Brief Amicus Curiae, *supra* at v-vi.

Question Presented

Whether the decision of the court below improperly restricts the legitimate exercise of admiralty jurisdiction in cases involving shipyard workers exposed to asbestos-containing maritime products in a manner inconsistent with the prior rulings

of this Court and with the purposes and policies underlying the application of maritime law.

Argument

The decision of the court below clearly rejects the traditional scope of admiralty jurisdiction as delineated by the United States Constitution and the pronouncements of this Court. This decision reflects a fundamental misapplication of the "nexus" test of admiralty jurisdiction enunciated by this Court in *Executive Jet Aviation, Inc. v. City of Cleveland,* 409 U.S. 249 (1972), and constitutes a wholly inappropriate abandonment of the legitimate federal interest implicit in the application of maritime law. If this decision is not subjected to the scrutiny of this Court by writ of certiorari, the novel and unfounded approach formulated therein will result in the veritable amputation of a significant portion of federal jurisdiction, replacing the uniformity of decision and coherence of national policy provided by federal maritime law with the inconsistent and irreconcilable approaches of the various states.

Historically, the admiralty jurisdiction of the federal judiciary has been broadly construed. The Constitution provides that the judicial power of the United States shall extend to "all Cases of admiralty and maritime Jurisdiction." U.S. Const. art. III, §2. This constitutional grant of subject-matter jurisdiction was first legislatively implemented in the Judiciary Act of 1789 and is presently codified at 28 U.S.C. §1333. This statute provides unambiguously that "[t]he district courts shall have original jurisdiction . . . of . . . [a]ny civil case of admiralty or maritime jurisdiction . . . ." *Id.*

In interpreting this venerable grant of federal jurisdiction, this Court has traditionally shown considerable latitude in applying the theoretical underpinnings of admiralty jurisdiction to the myriad factual circumstances which implicate maritime jurisprudence. *E.g. Fitzgerald v. United States Lines Co. 374 U.S. 20 (1963), Southern Steamship Co. v. National Labor Relations Bd., 316 U.S. 31 (1942); The Lottawanna,* 88 U.S. (21 Wall.) 558 (1874); *The Montello,* 87 U.S. (20 Wall.) 430 (1874); *The Daniel Ball,* 77 U.S. (10 Wall.) 557 (1870); *The Genessee Chief v. Fitzhugh,* 53 U.S. (12 How.) 443 (1851). Admiralty jurisdiction "is to be interpreted by a more enlarged view of its essential nature

and objects . . . ." *Insurance Co. v. Dunham,* 78 U.S. (11 Wall.) 1, 24 (1871). As forcefully stated by Justice Story in *DeLorio v. Boit,* 7 F. Cas. 418 (C.C.D. Mass. 1815):

> [T]here is no solid reason for construing the terms of the Constitution in a narrow or limited sense . . . . The advantages resulting to the commerce and navigation of the United States, from a uniformity of rules and decisions in all maritime questions, authorize us to believe that national policy, as well as judicial logic, require the clause of the constitution to be so construed, as to enbrace all maritime contracts, torts and injuries.

Id. at 443.

While the traditional test of admiralty jurisdiction, often denominated the "situs" or "strict locality" test, focused solely on the place where the tort occurred in assessing its maritime nature, *see generally Victory Carriers, Inc. v. Law,* 404 U.S. 202, 205 n.2 (1971), criticism of the frequently anomalous results produced by this mechanical approach eventually resulted in its replacement by a more discriminating test. In *Executive Jet Aviation, Inc. v. City of Cleveland,* 409 U.S. 249 (1972), this Court articulated a two-part test in the context of an aviation tort that has come to be described as the "locality plus" or "nexus" test. To avoid "the perverse and casuistic borderline situations that have demonstrated some problems with the locality test of maritime tort jurisdiction," *id.* at 498, the Court required some nexus between the tort and traditional maritime activity as a prerequisite to admiralty jurisdiction.

> [I]n determining whether there is admiralty jurisdiction over a particular tort or class of torts, reliance on the relationship of the wrong to traditional maritime activity is often more consonant with the purposes of maritime law than is a purely mechanical application of the locality test.

Id. at 261. *E.g., Foremost Ins. Co. v. Richardson,* 457 U.S. 668 (1982).

However, the four-part test formulated by the court below, which professes to merely adopt the nexus test previously described, fundamentally distorts the test enunciated in *Executive Jet Aviation* and endorsed in *Foremost Insurance Company.* The court below advanced "four factors in analyzing the relationship a given claim bears to traditional maritime activity: (1) the

factors and roles of the parties; (2) the types of vehicles and instrumentalities involved; (3) the causation and the type of injury; and (4) traditional concepts of the role of admiralty law," *Oman v. Johns-Manville Corp.*, 764 F.2d 224, 230 (4th Cir. 1985) (*en banc*) (footnote omitted). As applied to the facts of this case, the test formulated by the court below resulted in the untenable conclusion that admiralty jurisdiction did not extend to injuries received on board ships by shipbuilders and shipyard workers from asbestos-containing insulation products that were essential to the operation of those ships and were designed and marketed for maritime application.

Clearly, the facts of this case fall within the ambit of the traditional locality test and the nexus test of *Executive Jet Aviation*, as well as meeting the "commercial activity" requirement suggested by the dissent in *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 678 (1982) (Powell, J., dissenting) Thus, the decision of the court below represents an unwarranted constriction of the traditional admiralty jurisdiction that ignores the principle of broad construction which has heretofore guided the federal judiciary and contradicts the recent decisions of this Court.

In addition to improperly restricting the admiralty jurisdiction with which the federal courts have been historically endowed, the decision of the court below will erect numerous impediments to the just and fair resolution of asbestos-related maritime claims. One of the primary justifications for admiralty jurisdiction has been the "uniformity of rules and decisions . . .," *DeLorito v. Boit*, 7 F. Cas. 418, 443 (C.C.D. Mass. 1815), provided by a predictable and consistent body of federal maritime law. *See, e.g., Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959). This "uniform body of substantive maritime law applicable throughout the country," C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure §3671 at 419 (2d ed. 1985), is essential to avoid the inconsistent and inequitable resolution of similar claims based on conflicting state laws. It is beyond dispute that the effect of the decisions below will be to subject plaintiffs to the often cruel vagaries of those state laws, thereby raising the very real possibility of forum shopping.

Moreover, the decision of the court below constitutes an abdication of the responsibility of the federal judiciary toward the national policies and federal interests implicated by maritime

torts. As stated in *DeLorio v. Boit*, 7 F. Cas. 418 (C.C.D. Mass. 1815), "national policy . . . require[s] the clause of the constitution to be so construed, as to embrace all maritime contacts, torts and injuries . . ." *Id.* at 443. To hold otherwise would diminish the uniquely federal interests which inhere to maritime activity. Furthermore, the "special solicitude" traditionally applicable to seamen, *e.g., Moragne v. State Marine Lines*, 914 U.S. 375, 387 (1970), should be equally applicable to the maritime workers involved herein.

These adverse consequences occasioned by this decision are exacerbated by the context in which they arise. "In the fifteen years since the filing of the first suits, the field of asbestos litigation has exploded." *Jackson v. Johns-Manville Sales Corp.*, 750 F. 2d 1314, 1330 (5th Cir. 1985) (*en banc*) (Clark, C.J., dissenting). "The scope of this mass litigation is without precedent and practically without dimension." *Jackson v. Johns-Manville Sales Corp.*, 727 F.2d 506, 524 (5th Cir. 1984), *superseded in part*, 750 F.2d 1314 (5th Cir. 1985) (*en banc*). *See generally* Special Project, *An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation*, 36 Vand. L. Rev. 573 (1983). The instant case is among the "25,000 pending in federal and state courts." *Gideon v. Johns-Manville Sales Corp.*, No. 83-2626 at 1 (5th Cir. June 3, 1985) (footnote omitted). "No other category of tort litigation has even approached, either qualitatively or quantitatively, the magnitude of claims predicated on asbestos exposure." *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1335-36 (5th Cir. 1985) (*en banc*) (Clark, C.J., dissenting). It is indeed ironic that, amid the increasing calls for the application of some sort of federally-crafted common law to asbestos litigation, *see, e.g., id.* at 1330-36 (Clark, C.J., dissenting), the court below has withdrawn the predictable and uniform body of federal maritime jurisprudence from this category of cases.

Summary of Argument

Thus, the decision of the court below constitutes an inappropriate and unprecedented restriction of the admiralty jurisdiction traditionally possessed by the federal judiciary that is inconsistent with the prior decisions of this Court. The adverse consequences of this decision are numerous and significant, including the elimination of the uniform and predictable body of

federal maritime jurisprudence, the abandonment of plaintiffs in asbestos-related maritime litigation to the vagaries of conflicting and inconsistent state laws, and the abdication of the national policies and federal interests implicit in such maritime torts. Since "Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law," *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 20 (1963), this Court must now review and correct the erroneous test adopted by the court below.

Conclusion

For the foregoing reasons, amicus curiae contends that the decision of the court below is erroneous and should be subjected to the review of the Court by writ of certiorari.

Respectfully submitted,

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